UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

ELMER N. RODRIGUEZ,

Plaintiff,

v.

GONSALVES & SANTUCCI, INC.,

Defendant.

Case No. 21-cv-07874-LB

ORDER GRANTING MOTION TO DISMISS THE AMENDED COMPLAINT

Re: ECF No. 34

INTRODUCTION

In this putative class action, the plaintiff — a construction worker — sued his former employer in state court, claiming that employees routinely worked overtime hours, generally because they were not compensated for tasks that they had to complete before clocking in at the beginning of the day and after clocking off at the end of the day. This meant that the plaintiffs were not paid minimum wage and did not receive accurate wage statements. The court previously dismissed an earlier complaint on the ground that § 201 of the Labor Management Relations Act preempted the claims because they either (1) involve rights conferred directly by the parties' collective-bargaining agreement (CBA) or (2) substantially depend on analysis and interpretation of the CBA. The LMRA also preempts the claims in the amended complaint.

STATEMENT

1. Fact Allegations About Job Duties and Claims

The earlier complaint and the new complaint describe the putative class members' job duties that allegedly resulted in uncompensated hours, thereby driving down the overall wages below the minimum wage and resulting in overtime hours.

1.1 Initial Complaint

In the initial complaint, the plaintiff alleged that class members worked overtime hours because the defendant made them work off the clock "by, among other things, failing to accurately track and/or pay for all minutes actually worked; engaging, suffering, or permitting employees to work off the clock, including, without limitation, by requiring employees: to make phone calls or drive off the clock; detrimental rounding of employee time entries, and editing and/or manipulation of time entries to show less minutes than actually worked. . . ."[1] They also claimed an inability to take their meal and rest breaks.[2] As a result, the defendant did not pay employees the full wages due them on termination (including overtime and minimum wages and vacation pay). This meant that their wage statements were inaccurate.[3] The employer did not reimburse costs that employees incurred in (1) buying mandatory work uniforms, safety equipment, and tools, (2) laundering mandatory uniforms, and (3) using personal cell phones for work.[4] The defendant also had a policy of not paying employees with compensation at their final rate of pay for unused vested vacation pay.[5]

The complaint had the following claims: (1) failure to pay overtime pay (claim one); (2) failure to pay minimum wages (claim two); (3) failure to provide meal and rest breaks (claims three and four); (4) failure to pay all wages on termination (claim five); (5) failure to provide

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[1] Compl. – ECF No. 2 at 4 (¶¶ 10–11). Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents, except that when the order cites the CBAs, it also cites the page numbers at the bottom of the CBAs.

[2] *Id.* at 5 (¶¶ 12–13).

[3] *Id.* (¶¶ 14–15).

[4] *Id.* at 5–6 (¶ 16).

[5] *Id.* at 6 (¶ 17).

accurate wage statements (claim six); (6) failure to reimburse employees for necessary expenditures in violation of Cal. Labor Code § 2802 (claim seven); (7) failure to pay vested vacation pay in violation of Cal. Labor Code § 227.3 (claim eight); and (8) a violation of California's Unfair Competition Law (UCL), Cal. Labor Code § 17200, predicated on the underlying Labor Code violations (claim nine).[6] The complaint did not mention the CBA or whether the plaintiff invoked the dispute-resolution process.

1.2 Amended Complaint

In the amended complaint, the plaintiff alleged that class members worked overtime hours because the defendant made them work off the clock "by, among other things, failing to accurately track and/or pay for all minutes actually worked; engaging, suffering, or permitting [class members] to work off the clock, including, without limitation, by requiring . . . Class Members: to come early to work and leave late [from] work without being able to clock in for all that time, to complete pre-shift tasks before clocking in and post-shift tasks after clocking out, to don and doff unforms and safety equipment off the clock, and/or go through temperature checks off the clock; detrimental rounding of . . . time entries; and editing and/or manipulation of time entries to show less hours than actually worked." The off-the-clock tasks consisted of the following: "waiting in line, outside of the worksite, to have their temperatures checked, for a period within the Covid-19 pandemic, including but not limited to, in the month of April 2020," for periods up to 45 minutes because there was only one thermometer. After their shift, class members worked off the clock for about fifteen minutes to collect and store their tools (cables, torches, drills, and electrical saws). The class members also had to don and doff their uniforms off the clock, a task that took between fifteen and twenty minutes. This resulted in "occasional pay periods where employees were not paid for all time worked. . . ."[7] As a result, the defendant did not pay class members the full wages due them on termination. This meant that their wage statements were inaccurate.[8]

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[6] *Id.* at 10–20 (¶¶ 30–92).

[7] FAC – ECF No. 32 at 4–5 (¶ 10).

[8] *Id.* at 5 –6 (¶¶ 11–12).

The FAC has the following claims: (1) failure to pay minimum wages in violation of Cal. Labor Code § 1197; (2) failure to provide accurate wage statements in violation of Cal. Labor Code § 226(a); (3) failure to pay all wages on termination in violation of Cal. Labor Code § 201–02; and (4) unfair competition in violation of the UCL.[9] The complaint did not mention the CBA or whether the plaintiff invoked the dispute-resolution process.

2. The CBA

The plaintiff worked for the defendant on construction projects from February 2020 to December 2020 and was a member of a CBA governing ironworkers' employment. The 2017 CBA covered July 1, 2017, to June 30, 2020, and the 2020 CBA covered July 1, 2020, to December 31, 2024.[10]

The relevant sections of the CBA (also recited in the earlier order[11]) are as follows.

The CBA provides that the union is the employees' exclusive bargaining representative and sets forth the work covered under the CBA.[12] Covered work includes the minimum hourly and overtime compensation for the plaintiff and the putative class, scheduled wage increases, the hours of work, and meal and rest periods. For example, it defines eight hours as a day's work (occurring between the hours of 5 a.m. and 5 p.m.) and identifies overtime hours that will be paid at either 1.5 times or twice the hourly rate.[13]

The CBA defines how pay is distributed and the content of the pay statements. Payday is once a week on a day agreed to by the union and the employer, and wages are paid before quitting time in cash, by check, or by an electronic-fund transfer (among other means). Each payment of wages

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[9] *Id.* at 9– 14 (¶¶ 26–52).

[10] *Id.* at 2 (¶ 2). Req. for Judicial Notice – ECF No. 14 (citing authorities that allow the court to take judicial notice of CBAs) & CBAs, Exs. A, B to *id.* – ECF No. 14-1, 14-2. The court previously took judicial notice of the CBAs. Order – ECF No. 31 at 2 n.4 (request was unopposed).

[11] Order – ECF No. 31 at 2–4.

[12] 2020 CBA § 7 – ECF No. 14-1 at 12 (p. 1); 2020 CBA § 7 – ECF No. 14-2 at 13 (p. 1), 35 (p. 23). s

[13] 2017 CBA § 6(B-2) – ECF No. 14-1 at 33–34 (pp. 22–23); 2020 CBA§ 6(B-2) – ECF No. 14-2 at 30–31 (pp. 18–23).

is accompanied by a wage statement that identifies the employer, the total earnings, the deductions (and their purposes), and net wages.[14]

The CBA also provides grievance procedures for disputes. There is a board for settlement of disputes comprised of two union representatives and two employer representatives, and the CBA has a process (including the appointment of a fifth independent member if the board members cannot agree) for resolving disputes arising out of the "meaning and enforcement" of the CBA.[15]

3. Relevant Procedural History

The court held a hearing on the motion to dismiss on March 31, 2022. All parties consented to magistrate-judge jurisdiction under 28 U.S.C. § 636.[16]

ANALYSIS

LMRA § 301 establishes federal jurisdiction for "[s]uits for violations of contracts between an employer and a labor organization." 28 U.S.C. § 185(a). It completely preempts any state claims based on alleged violations of collective-bargaining agreements between employers and labor organizations. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 23 (1983). The test for preemption is whether resolution of the state claim requires the court to construe a provision of the CBA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–06 (1988); *Dent v. Nat'l Football League*, 902 F.3d 1109, 1116–17 (9th Cir. 2018). If a claim is "founded directly on rights created by collective-bargaining agreements" or is "substantially dependent on analysis of a collective-bargaining agreement," then § 301 preempts it. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (cleaned up). But "the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be

[14] 2017 CBA § 8 – ECF No. 14-1 at 44–45 (pp. 33–34); 2020 CBA § 8 – ECF No. 14-2 at 44–45 (pp. 32–33).

[15] 2017 CBA § 28 – ECF No. 14-1 at 77–78 (pp. 66–67); 2020 CBA § 28 – ECF No. 14-2 at 75–76 (pp. 63–64).

[16] Consents – ECF Nos. 10, 12.

extinguished." *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). "The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense." *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) (en banc); *see Dent*, 902 F.3d at 1116 ("The plaintiff's claim is the touchstone of the § 301 analysis.") (cleaned up).

The preemption inquiry thus has two parts. First, a court must determine "whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA. If the right exists solely as a result of the CBA, then the claim is preempted." *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059–60 (9th Cir. 2007). Second, if the right underlying the state claim exists independently of the CBA, then the court considers whether the right is "substantially dependent on analysis of a collective bargaining agreement." *Id.* (cleaned up).

The FAC has the following claims: (1) failure to pay minimum wages in violation of Cal. Labor Code § 1197 (claim one); (2) failure to provide accurate wage statements in violation of Cal. Labor Code § 226(a) (claim two); (3) failure to pay all wages on termination in violation of Cal. Labor Code § 201–02 (claim three); and (4) unfair competition in violation of the UCL (claim four).[17]

The plaintiff claims that the defendant failed to pay minimum wages for pre-and-post shift off-the-clock activity (such as changing into uniforms, undergoing pre-shift COVID-19 screening, and post-shift equipment storage).[18] He contends that the claims — all predicated on pre-shift and post-shift off-the-clock tasks — do not require an interpretation of the CBA's terms and thus are not preempted.[19] He said that he does not rely for relief on the CBA and instead "seeks to recover for time spent completing activities which are compensable under state law, but for which he received no compensation by Defendant."[20] He also points out that unlike overtime claims, where

[17] FAC – ECF No. 32 at 9– 14 (¶¶ 26–52).

[18] *Id.* at 4–5 (¶ 10).

[19] Opp'n – ECF No. 37 at 14–18.

[20] *Id.* at 14.

there is a Labor Code CBA-based exemption for overtime pay, there is no similar exemption for minimum-wage pay.[21] The defendant contends that the CBA details the hours of work, actual hours worked, hourly rates, workdays, shift work, and show-up expenses, and that resolution of the claims requires interpretation of these terms.[22]

The main claim is the unpaid minimum-wage claim. In sum, the allegations are that the off-the-clock work meant that sometimes employees were not paid for all time worked. That in turn meant that the defendant did not pay class members the full wages due them on termination and that their wage statements were inaccurate.[23] If the predicate minimum-wage claim is preempted, the other claims fail too. All claims are preempted.

The CBA is detailed and spells out all aspects of the parties' work relationship, including the terms that the defendant identified.[24] The unpaid minimum-wage claim turns on these terms. "Determining the meaning of industry terms is a form of interpretation." *Marquez v. Toll Global Forwarding*, 804 F. App'x 679, 681 (9th Cir. 2020) (affirming dismissal of a rest-period claim under the second prong of *Burnside* because the claim required the court to interpret industry terms such as "permit," "load," "unattended," and "leave a load."); *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1035 (9th Cir. 2015) (claims that would require defining terms of the CBA were preempted). As the court held previously, because the claim for unpaid minimum wages substantially depends on an analysis of the CBA, the LMRA preempts the claim.[25]

The plaintiff cites several cases to support his position that interpretation of the CBA nonetheless is not required for the off-the-clock claim here. They do not change the outcome.

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[21] *Id.* at 15. In the earlier complaint, the plaintiff alleged a failure to pay overtime pay in violation of Cal. Labor Code § 510. The court dismissed the claim because § 510 does not apply to an employee covered by a valid CBA that covers overtime wages when the wage rates meet certain minimums. Cal. Labor Code § 514. Order – ECF No. 31 at 6–8.

[22] Reply – ECF No. 38 at 4–5; 2017 CBA §§ 6–8 – ECF No. 14-1 at 31–45 (pp. 20–34); 2020 CBA §§ 6–8 – ECF No. 14-2 at 16–21 (pp. 28–33).

[23] FAC – ECF No. 32 at 4–6 (¶¶ 10–12).

[24] 2017 CBA §§ 6–8 – ECF No. 14-1 at 31–45 (pp. 20–34); 2020 CBA §§ 6–8 – ECF No. 14-2 at 16–21 (pp. 28–33).

[25] Order – ECF No. 31 at 9–10.

First, he cites *Parker v. Cherne Contracting Corp.* for the contention that "preemption is not appropriate when, as here, a plaintiff 'assert[s] various wage and hours claims based on a failure to compensate at all for certain hours allegedly worked.'" No. 18-cv-01912-HSG, 2019 WL 359989, at *6 (N.D. Cal. Jan. 29, 2019).[26] The uncompensated time in *Parker* involved waiting for or traveling on company shuttles to and from worksites. *Id.* at *1. The court observed that courts "have routinely held that California wage and hours claims are not preempted" when they are based on a failure to compensate at all for certain hours allegedly worked). *Id.* (citing *Mauia v. Petrochem Insulation, Inc.*, No. 18-CV-01815-MEJ, 2018 WL 3241049, at *9 (N.D. Cal. July 3, 2018) (collecting cases)). The *Parker* CBA defined the "amount of the minimum wage," a term that the *Parker* defendant said necessarily implicated the CBA. The court held that it did not: "the [d]efendant has not identified any substantive dispute over the language of the CBA that would require interpretation, and the Court therefore finds that the minimum wage claims . . . are not preempted by the LMRA." *Id.* The defendant here distinguishes *Parker* persuasively: it involved only the application of the minimum-wage rate in the CBA.[27] By contrast, this case involves the interpretation of other terms.

Second, the plaintiff cites *Andrade v. Rehrig Pac. Co.*, No. 20-cv-1448 FMO (RAOx), 2020 WL 1934954, at * 3 (C.D. Cal. April 22, 2020), for the contention that the LMRA does not preempt the claim, even where a CBA defines the wages or hours of work.[28] The court there held that "irrespective of how 'the wages' or 'hours of work' are determined under a CBA, plaintiff is entitled to be paid a minimum wage and overtime for all hours he was under the 'control' of defendant." *Id.* (collecting cases). But the case involved overtime pay and the interplay of whether the CBA met the threshold requirements of the California Labor Code. *Id.* By contrast, in this case, after the court dismissed the overtime claim in the earlier complaint, the plaintiff abandoned it.[29]

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[26] Opp'n – ECF No. 37 at 16 (emphasis omitted) (citing *Parker*, 2019 WL 359989, at *6).

[27] Reply – ECF No. 38 at 4 n.1.

[28] Opp'n – ECF No. 37 at 16.

[29] Order – ECF No. 31 at 6–8 (applying Cal. Labor Code § 514).

Third, the plaintiff cites *McGhee v. Tesoro Refining & Mktg. Co. LLC* for the premise that there is no LMRA preemption here because the terms in the CBA are not complicated. 440 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020).[30] The employer in *McGee* allegedly did not pay employees for periods when they were on call. *Id.* at 1065–66. The court held that the defendants failed to show anything more than a "hypothetical connection between the claims and the terms of the CBA" and "fail[ed] to demonstrate that any CBA provision [was] actively disputed." *McGhee*, 440 F. Supp. 3d at 1069–70 (quoting *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 689, 691 (9th Cir. 2001)). By contrast, here the defendants have identified terms in the CBA that require interpretation.[31]

The derivative claims rely on the dismissed claim and claims that have not been submitted under the grievance procedure in the CBA.[32] The court dismisses them too. *Jimenez v. Young's Mkt. Co., LLC*, No. 21-cv-02410-EMC, 2021 WL 5999082, at *13 (N.D. Cal. Dec. 12, 2021) (derivative claims preempted).

CONCLUSION

The court dismisses the FAC with prejudice because the LMRA preempts all claims. This resolves ECF No. 34.

IT IS SO ORDERED.

Dated: April 5, 2022

LAUREL BEELER
United States Magistrate Judge

[30] Opp'n – ECF No. 37 at 17.

[31] Mot. to Dismiss – ECF No. 34 at 10; Reply – ECF No. 38 at 4.

[32] Order – ECF No. 31 at 10–11; Reply – ECF No. 38 at 4–6 (making this argument and collecting cases that a union-represented employee must exhaust any grievance or arbitration remedy provided by a CBA before filing a claim to vindicate rights provided under the CBA).